

VERNER · LIIPFERT
BERNHARD · McPHERSON ^{ON} HAND
CHARTERED

ERIC THOMAS WERNER
(202) 371-6230

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

RECEIVED

SEP 27 1996

COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

September 27, 1996

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL


Re: Section 257 Proceeding to Identify and Eliminate Market Entry Barriers
for Small Businesses, FCC 96-216, released May 21, 1996 (Notice of
Inquiry in GN Docket No. 96-113)

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Sections 1.430 and 1.419 of the Commission's Rules, I enclose herewith for filing an original and four (4) copies of Orion's Comments in response to the Notice of Inquiry in the proceeding noted above.

Kindly stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,


Eric T. Werner

Enclosures

cc: Richard H. Shay, Esquire
April McClain-Delaney, Esquire
Thomas J. Keller, Esquire
Service list

No. of Copies sent
List A B C D E

HOUSTON, TEXAS OFFICE
2600 TEXAS COMMERCE TOWER
600 TRAVIS
HOUSTON, TEXAS 77002
(713) 237-9034
FAX: (713) 237-1216

AUSTIN, TEXAS OFFICE
SAN JACINTO CENTER
98 SAN JACINTO BLVD., SUITE 1440
AUSTIN, TEXAS 78701
(512) 703-6000
FAX: (512) 703-6003

HONOLULU, HAWAII OFFICE
HAWAII TIMES BUILDING
928 NUUANU AVE., SUITE 400
HONOLULU, HAWAII 96817
(808) 566-0999
FAX: (808) 566-0995

McLEAN, VIRGINIA OFFICE
8280 GREENSBORO DRIVE
SUITE 601
McLEAN, VIRGINIA 22102
(703) 749-6000
FAX: (703) 749-6027

SEP 27 1996

)

)

)

)

)

)

TO: The Commission

ORION NETWORK SYSTEMS, INC. ("Orion"), by its attorneys, and pursuant to Sections 1.430, 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.430, 1.415, 1.419 (1995), hereby submits its Comments in accordance with the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry in the above-captioned proceeding ("Notice").^{1/}

Section 257 of the Communications Act of 1934,^{2/} in relevant part, instructs the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small business in the provision and ownership of telecommunications services" in order to "promote the policies and purposes of [the Telecommunications Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and

1/ Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, FCC 96-216, released May 21, 1996 (Notice of Inquiry in GN Docket No. 96-113). The Commission extended the deadline for filing comments in this proceeding to September 27, 1996, by Order FCC DA96-1433, released August 23, 1996.

2/ Section 257 was added to the Communications Act by Section 101 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56, 77 (1996).

promotion of the public interest, convenience, and necessity."^{3/} The Commission's Notice represents a welcome and meaningful first step in carrying out this directive.

As a leader in entrepreneurial efforts to introduce competition to the world market for international fixed satellite services ("FSS"), Orion commends the Commission's action in the Notice and urges the Commission to act quickly to eradicate the market barriers existing in its own regulations which have for too long unnecessarily impeded the ability of small, entrepreneurial entities like Orion to reach the marketplace in a timely fashion or, in some cases, at all. Among the most grievous of the barriers which the Commission should abandon are the inequitable and unjust financial qualifications standards under Section 25.140(d) of the Commission's rules and the "one-stage" processing procedure under which they are applied.

In numerous filings with the Commission, Orion has repeatedly identified and explained the unfair and anti-competitive impact of these rules as they apply to smaller, entrepreneurial satellite operators like Orion. *See, e.g.,* Petition for Reconsideration in IB Docket No. 95-41, *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems* ("DISCO I"), filed April 11, 1996 by Orion Network Systems, Inc. ("DISCO I Reconsideration Petition"); Comments of Orion Network Systems, Inc., in IB Docket No. 95-41, filed June 8, 1995 ("DISCO I Comments") [copies of the DISCO I Reconsideration Petition and DISCO I Comments are appended hereto as Attachments A and B respectively.]^{4/} Rather than burden the

^{3/} *Id.*; 47 U.S.C. § 257(a), (b).

^{4/} Orion further amplified the irrationality of the Commission's "one-stage" financial qualification showing in its recent comments and reply comments filed IB Docket No. 96-
(continued...)

Commission's files with a lengthy recapitulation of the arguments set forth in those pleadings, Orion herewith incorporates them by reference as though fully set forth herein.

CONCLUSION


In conclusion, Orion respectfully recommends that the Commission (1) establish pro-competitive parity in the substantive financial showings required from "self-funded" and "non-self-funded" FSS applicants and (2) re-establish "two-stage" financial qualifications processing for non-self-funded FSS applicants consistent with the discussions in Orion's previous filings with the Commission on this issue.

Respectfully submitted,

ORION NETWORK SYSTEMS, INC.

Richard H. Shay, Esquire
V.P. Corporate and Regulatory Affairs
April McClain-Delaney, Esquire
Director of Regulatory Affairs
ORION NETWORK SYSTEMS, INC.
2440 Research Boulevard
Suite 400
Rockville, Maryland 20850
(301) 258-3200

By:


Thomas J. Keller
Eric T. Werner
VERNER, LIIPFERT, BERNHARD,
MCIPHERSON AND HAND, CHARTERED
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

Its Attorneys

Date: September 27, 1996

4/(...continued)

111, *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States* ("DISCO II") and related proceedings. See Comments of Orion Network Systems, Inc., filed July 15, 1996 in IB Docket No. 96-111; Reply Comments of Orion Network Systems, Inc., filed August 16, 1996.

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary for the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that I have, this date, sent copies of the foregoing "Comments of Orion Network Systems, Inc." to each of the following by First Class United States mail, postage prepaid:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Ms. S. Jenell Trigg
Office of Communications Business
Opportunities
Federal Communications Commission
1919 M Street, N.W.
Room 644
Washington, D.C. 20554

Linda L. Haller, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 616
Washington, D.C. 20554

Dated: September 27, 1996


Bridget Y. Monroe

ATTACHMENT A

VERNER · LIIPFERT
BERNHARD · MCPHERSON & HAND
CHARTERED

ERIC THOMAS WERNER
(202) 371-6230

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

April 11, 1996

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

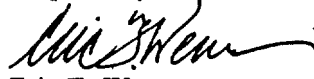
Re: IB Docket No. 95-41, *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems* -- Petition for Reconsideration

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Section 1.429 of the Commission's Rules, I enclose herewith for filing an original and eleven (11) copies of Orion's Petition for Reconsideration of the *Report and Order* in the proceeding noted above. *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, FCC 96-14, released January 22, 1996, 61 FED. REG. 9946 (Mar. 12, 1996).

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,



Eric T. Werner

Enclosures

cc: Richard H. Shay, Esquire
April McClain-Delaney, Esquire
Thomas J. Keller, Esquire

HOUSTON, TEXAS OFFICE
2600 TEXAS COMMERCE TOWER
600 TRAVIS
HOUSTON, TEXAS 77002
(713) 237-9034
FAX: (713) 237-1216

AUSTIN, TEXAS OFFICE
SAN JACINTO CENTER
98 SAN JACINTO BLVD., SUITE 1440
AUSTIN, TEXAS 78701
(512) 703-6000
FAX: (512) 703-6003

HONOLULU, HAWAII OFFICE
HAWAII TRUST BUILDING
928 NUUANU AVE., SUITE 400
HONOLULU, HAWAII 96817
(808) 566-0999
FAX: (808) 566-0995

MCLEAN, VIRGINIA OFFICE
8280 GREENSBORO DRIVE
SUITE 601
MCLEAN, VIRGINIA 22102
(703) 749-6000
FAX: (703) 749-6027

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Amendment to the Commission's)	IB Docket No. 95-41
Regulatory Policies Governing)	
Domestic Fixed Satellites and)	
Separate International Satellite)	
Systems)	
)	
and)	
)	
DBSC Petition for Declaratory)	File No. DBS-88-08/94-13DR
Rulemaking Regarding the Use of)	
Transponders to provide)	
International DBS Service)	

TO: The Commission

PETITION FOR RECONSIDERATION

ORION NETWORK SYSTEMS, INC.

Richard H. Shay
V.P. Corporate and Regulatory Affairs
April McClain-Delaney
Director of Regulatory Affairs
ORION NETWORK SYSTEMS, INC.
2440 Research Boulevard
Suite 400
Rockville, Maryland 20850
(301) 258-3200

Counsel to
Orion Network Systems, Inc.

Thomas J. Keller
Eric T. Werner
VERNER, LIIPFERT, BERNHARD,
MCIPHERSON AND HAND, CHARTERED
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

Its Attorneys

April 11, 1996

TABLE OF CONTENTS

TABLE OF CONTENTS	i
SUMMARY	ii
I. BACKGROUND	2
II. DISCUSSION	5
A. The Commission's Decision to Apply the "One-Stage" Financial Qualification Requirement to International Satellite Operators is Unsupported and Fails to Address the Fundamental Inequities In the Financial Showings Required of Applicants	5
1. The Commission's Action is Factually Unsupported	5
2. A Fundamental Inequity in the Substantive Financial Showing Required From Applicants Impairs Competition and Must be Remedied	10
B. Processing Rounds Should Not Be Employed for Fixed Satellite Systems Proposed for Locations Outside of the Traditional Domestic Orbital Arc	13
III. CONCLUSION	16

SUMMARY

In many respects, the Commission's decision in the *Report and Order* in IB Docket No. 95-41 to eliminate the artificial regulatory barriers that prevented fixed satellite licensees from providing service to both the international and domestic markets is a significant step forward in promoting competition in the fixed satellite services marketplace. Regrettably, two corollary changes the Commission adopted along with its primary policy shift -- *i.e.*, its decisions to apply the "one-stage" financial qualification standard uniformly to all fixed satellite applicants and to subject applicants for international orbital locations to consolidated processing rounds with applicants specifying domestic orbital slots -- contravene the pro-competition objectives the Commission sought to advance in the *Report and Order* and will create serious hardships for smaller, entrepreneurial applicants.

The Commission must reconsider its treatment of the financial qualifications issue for three reasons: First, even assuming that the potential warehousing of international orbital slots is a valid concern following the *Report and Order*, the Commission's response, namely, subjecting all U.S. FSS applicants to a one-stage financial qualification standard, does not remedy the problem because it does not and cannot prevent such warehousing by foreign entities or "financially qualified" self-funded U.S. applicants. Second, the record provides no evidence to substantiate that, if the potential for warehousing actually exists, the demand for international orbital slots is likely to be so great that warehousing will present a problem. Finally, to the extent the Commission's stated purpose in the *Report and Order* is to advance competition in the fixed satellite services marketplace, it must reconsider the financial qualification issue to bring the substantive financial showings required from non-self-funded

applicants into harmony with those required of self-funded applicants to place these applicants on an equal competitive footing.

The Commission must also reconsider its decision to employ consolidated processing rounds for all FSS applicants because it provided no analytical basis to support the action; the most likely basis for the action does not support it; and it is, in any event, bad policy.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment to the Commission's)	IB Docket No. 95-41
Regulatory Policies Governing)	
Domestic Fixed Satellites and)	
Separate International Satellite)	
Systems)	
)	
and)	
)	
DBSC Petition for Declaratory)	File No. DBS-88-08/94-13DR
Rulemaking Regarding the Use of)	
Transponders to provide)	
International DBS Service)	

TO: The Commission

PETITION FOR RECONSIDERATION

ORION NETWORK SYSTEMS, INC. (hereinafter "Orion"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429 (1995), hereby submits its Petition for Reconsideration ("Petition") of the *Report and Order* in the above-captioned proceeding adopted January 19, 1996 by the Federal Communications Commission ("FCC" or "Commission") and released January 22, 1996 ("*Report and Order*").^{1/}

The action taken in the *Report and Order* significantly affected the rationales the FCC has historically used to distinguish between domestic and international fixed satellite systems and to justify disparate regulatory treatment of them. However, while the *Report and Order*

^{1/} The summary of the *Report and Order* appeared in the Federal Register on March 12, 1996. 61 FED. REG. 9946 (Mar. 12, 1996).

took several dramatic steps to modify the Commission's fixed satellite regulatory framework, in one respect it did not go far enough, and in two other respects it went too far.

I. BACKGROUND

The Commission's *Notice of Proposed Rulemaking* in IB Docket No. 95-41^{2/} proposed to eliminate many of the disparities in the treatment of domsats and separate satellite systems by abandoning the Transborder and Separate International Satellite Systems Policies in favor of a single regulatory scheme that would enable all fixed satellite operators to provide domestic and international service on a co-primary basis.^{3/} The Commission observed that the policy changes proposed in the *Notice* would necessitate certain other modifications to its satellite communications rules. Among these changes, the FCC proposed to eradicate the differences in the financial qualification requirements for domsats and separate satellite systems. *Id.* at 7794 ¶ 25.

Specifically, the *Notice* proposed to do away with the "two-stage" financial qualification showing applicable to separate systems, and make separate systems demonstrate evidence of full financing before the award of a license -- the so-called "one-stage" standard customarily applied to domsat applicants. *Id.*^{4/} The Commission expressed the view that,

^{2/} *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 10 FCC Rcd 7789, 7790 (¶ 5) (1995) (*Notice of Proposed Rulemaking* in IB Docket No. 95-41) [hereinafter "*Notice*"].

^{3/} *Notice*, 10 FCC Rcd at 7789 ¶ 1, 7795 ¶ 29.

^{4/} The Commission had originally adopted the one-stage standard for domsat applicants in order to assure the most rapid deployment of service to the public. The Commission recognized that competition was fierce for the available orbital locations in the domestic arc: The FCC wanted to ensure that underfinanced applicants did not delay service to the public by preventing a fully-financed applicant from receiving a license that it could implement immediately. By contrast, the Commission noted, the two-stage process was warranted for
(continued...)

once separate system applicants gained unrestricted access to the domestic market, they would "be able to obtain financial commitments based on the justified expectation of revenues from the provision of domestic service." *Id.* at 7795 ¶ 29.^{5/} Accordingly, the FCC tentatively concluded that the two-stage financial qualification process was unnecessary. *Id.* However, the *Notice* did not propose any changes to the underlying substantive elements of the financial showing required from self-financed applicants versus that required from applicants relying on external financing.^{6/} Thirty-nine parties, including Orion, filed comments in the proceeding, and sixteen of them, including Orion, filed Reply Comments.

On January 22, 1996, the Commission released its *Report and Order* in the IB Docket No. 95-41.^{7/} The FCC largely adopted the proposals set forth in the *Notice*, eliminating the Transborder Policy and modifying the Separate Satellite Systems Policy. The Commission also abandoned the two-stage financial qualification requirement, deciding to require all fixed satellite applicants to meet a one-stage showing obligation. In this regard, the Commission appeared to depart somewhat from its preliminary conclusion that separate system applicants

4/(...continued)

separate satellite system applicants because additional regulatory clearance processes peculiar to the international market (*e.g.*, obtaining foreign operating agreements and completing the Intelsat Article XIV(d) consultation process) often made it difficult for such applicants to procure binding financing commitments prior to completion of the authorization process. *Id.* ¶¶ 26-27.

5/ In addition, the Commission opined that much of the uncertainty associated with the international consultation and approval process had been eliminated as a consequence of recent changes in the Intelsat Article XIV(d) process. *Id.*

6/ See 47 C.F.R. § 25.140(d).

7/ *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, FCC 96-14, released January 22, 1996 (*Report and Order* in IB Docket No. 95-41).

would have a ready revenue stream from domestic services to offset any remaining impediments to financing that separate system applicants had previously experienced due to international regulatory requirements.^{8/} Instead, the Commission concluded that, notwithstanding the potential financial hardship to certain applicants, a uniform one-stage financial qualification showing for all applicants was necessary to prevent the accumulation of orbital slots by applicants without the financial wherewithal to use them. *Report and Order* at 14 ¶ 41. In the Commission's view the two-stage financial qualification process was unadvisable in view of the increased demand for orbital locations that the Commission expected to result from the *Report and Order*. *Id.* at 12-14 (¶¶ 35-41).

In a related action, immediately following the discussion of the financial qualifications issue, the Commission almost parenthetically inserted a change that had not been raised in the *Notice*. Specifically, the Commission stated that "[a]ny applications filed after the adoption date of this order will be considered in future 'consolidated' FSS rounds." *Id.* at 15 ¶ 44. The Commission did not elaborate on this conclusion beyond stating that no such applications would be considered until the Commission has first disposed of all pending separate system and domsat applications. *Id.*

^{8/} For example, the Commission specifically provided for applicants who specify orbital positions "well outside the traditional domestic arc." *Report and Order* at 14 ¶ 42. The Commission acknowledged that these "more easterly or westerly orbital locations" may provide limited domestic coverage and also are generally less in demand by competing applicants. *Id.* Accordingly, the Commission stated that it "will allow operators who apply for orbit locations in uncongested portions of the orbital arc to make a two-stage financial showing upon appropriate request." *Id.*

II. DISCUSSION

A. **The Commission's Decision to Apply the "One-Stage" Financial Qualification Requirement to International Satellite Operators is Unsupported and Fails to Address the Fundamental Inequities In the Financial Showings Required of Applicants**

Apart from the abandonment of the analytical dichotomy which separate fixed satellite systems into domestic on the one hand, and separate international systems on the other, perhaps the most far-reaching of the changes wrought by the *Report and Order* was the Commission's decision to apply the one-stage financial qualification showing previously applicable only to domsat applicants to all fixed satellite applicants, regardless of whether they specify an international orbital location or one in the domestic arc. In this one action, the Commission at once went too far, and yet not far enough. Too far, because the Commission failed to provide an adequate factual predicate to support its action, and not far enough because -- having determined to eliminate the distinctions between these formerly discrete services in order to enhance competition -- the Commission failed to harmonize a critical disparity in substantive financial qualification rules that undermines competition and serves only to enhance the already substantial market power of the largest entities in the fixed satellite marketplace.

1. **The Commission's Action is Factually Unsupported**

As the *Report and Order* acknowledges, the Commission originally predicated the elimination of the two-stage financial qualification showing applicable to international satellite operators on the notion that permitting international satellite operators to provide service in the domestic marketplace rendered the two-stage financial qualification showing unnecessary. *Report and Order* at 12 ¶ 36; *see also Notice*, 10 FCC Rcd at 7795 ¶ 29. Specifically, the

Commission reasoned that, following the change, "all applicants should be able to obtain financial commitments based on the justified expectation of revenues from the provision of domestic service." *Id.* at 12-13 ¶ 36.

Orion refuted this reasoning, demonstrating that international system operators could not, in fact, rely on any "justified expectation of revenues" from domestic offerings because the orbital locations they customarily occupy do not afford adequate coverage of the continental United States (CONUS) to assure a reliable stream of such revenues.^{9/} Indeed, the Commission itself acknowledged that "[b]ecause existing geostationary domestic fixed satellites occupy orbital locations best suited for domestic service and separate system satellites occupy orbital locations best suited for international service, these policy changes are not likely to result in full competition between in-orbit domestic and international systems in the near term." *Notice*, 10 FCC Rcd at 7793. Moreover, Orion also directed the Commission's attention to the fact that, notwithstanding its proposed abandonment of the distinction between domsats and separate systems, international regulatory barriers continue to exist which impair non-self-funded international satellite operators' ability to obtain irrevocable financing for their systems. *See* Orion Comments at 6.

In the *Report and Order*, the Commission tacitly conceded the point that international operators could not necessarily rely on domestic revenues to assure the availability of

^{9/} Orion stated that, "International systems and domestic systems are generally not serving the same customers, markets or geographic regions. Further, in the U.S. marketplace, domestic satellite operators have several advantages over international operators. Domestic orbital slots permit CONUS coverage. . . .[and] full CONUS coverage is generally acknowledged as more marketable and attractive to customers than regional coverage." Orion Comments at 7. Orion also observed that "[because] only a portion of an international satellite's transponders can be utilized for domestic services (depending upon position in orbital arc), only a corresponding "incidental" percentage of the revenue can be derived from side services." *Id.* at 8.

financing, and abandoned this as a basis for its action. *See Report and Order* at 14 ¶ 42.^{10/} Nevertheless, relying on arguments from the larger, and generally self-funded, domestic satellite operators (Hughes and AT&T), the Commission for the first time determined that one-stage financial processing was now necessary for all applicants to "prevent . . . entities without the requisite financial resources from tying up scarce orbital resources" *Id.* ¶ 41. This conclusion, that one-stage financial qualification showing is necessary to protect against "warehousing" of spectrum by applicants in the international orbital locations, as opposed to the much more congested domestic arc, is simply unsupported.

First and foremost, to the extent that warehousing of international orbital positions is a legitimate concern, the policy adopted by the Commission does not impede such warehousing by foreign entities and the international satellite organizations (*i.e.*, Intelsat and Inmarsat). While recognizing the increasingly globalized nature of the international satellite marketplace,^{11/} the Commission has adopted a policy that places an unnecessary regulatory burden on U.S. satellite licensees, thus impairing their global competitiveness relative to their unencumbered foreign counterparts. By thus tying the hands of U.S. companies, the Commission's policy runs squarely contrary to the agency's stated intention not to

^{10/} Acknowledging the problem confronting international separate system applicants who specify orbital positions "well outside the traditional domestic arc," the Commission observed that these "more easterly or westerly orbital locations" may provide limited domestic coverage and also are generally less in demand by competing applicants. *Id.* Accordingly, the Commission stated that it "will allow operators who apply for orbit locations in uncongested portions of the orbital arc to make a two-stage financial showing upon appropriate request." *Id.*

^{11/} *Report and Order* at 2 ¶ 3.

disadvantage those entities which seek to enter the international market through the doors of the FCC.^{12/}

Moreover, the Commission's new financial qualification regime does nothing to combat potential warehousing by the U.S. entities with the greatest incentive to engage in that practice. The large, highly-capitalized entities such as GE Americom, General Motors/Hughes, and AT&T have a strong incentive to preserve and maintain their market power by limiting the number of available transponders and keeping competitors out. Because they pass through the Commission's financial qualifications requirements as "self-funded" applicants, they have the ability to apply for and stockpile orbital locations to the detriment of foreign and smaller U.S. competitors.

Second, the Commission's policy prescribes a remedy without establishing that the asserted international warehousing problem actually exists. While the *Notice* recognized the Commission's "repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise the necessary financing, and those attempts often end unsuccessfully," *Notice*, 10 FCC Rcd at 7794 ¶ 26, the Commission emphasized that it adopted a one-stage financial showing standard for domsat applicants because "applications to implement domsats regularly exceed the number of available orbital locations" *Id.* (emphasis added).

^{12/} In a recent press account, the Chief of the FCC's International Bureau was quoted as stating, "Under no circumstances will we permit any enterprise to be disadvantaged by having decided to file with the U.S. rather than another administration." *GE-Gibraltar Pact 'May Be Appropriate,' Harris Says*, Telecommunications Reports, January 22, 1996 at 24. A similar incentive to avoid the FCC's regulatory structure altogether is created by the Commission's decision to employ consolidated processing rounds to award authorizations for international orbital positions. See discussion, *infra*, pp. 13-15.

Unlike the situation in the domestic arc, there is no evidence of any similar congestion -- or attempts at warehousing of spectrum -- in the segments of the orbital arc customarily occupied by satellites providing international services. Indeed, neither the Commission nor Hughes or AT&T cited a single example of a separate system operator which failed to satisfy its financial qualification showing under the two-stage process or otherwise failed to meet any of its obligations to commence service in a timely fashion.

All of the cases cited by the Commission, *Report and Order* at 14 n.57, involve domsats not separate systems. Furthermore, nothing in the record indicates that applications for international orbital locations will increase appreciably due to the elimination of the domsat/separate systems distinction or, if they do, that they will "regularly exceed the number of available orbital locations" thus implicating a concern about warehousing. Accordingly, the Commission's statement that it "anticipate[s] increased demand for a wider range of orbit locations," *id.* ¶ 41, amounts to nothing more than unquantified speculation.^{13/} Accordingly, the Commission should reconsider its decision generally to abandon two-stage financial qualifications processing for international satellite applicants in light of the inadequate factual predicate supporting it.

Moreover, the Commission's objective in adopting its unitary regulatory framework is to advance competition in the satellite marketplace to the greatest extent possible.^{14/} It must

^{13/} The fact that some satellites functioning at orbital locations over ocean areas can reach portions of the continental United States, *Report and Order* at 14 ¶ 41, does not perforce support the conclusion that demand for these slots will outstrip the supply as it has done in the context of the domestic arc. Indeed, nothing in the Commission's regulation forbade applicants in the past from applying for these locations as domsat orbital locations if they believed it economically viable to do so.

^{14/} *Report and Order* at 14 ¶ 40.

address in this context an even more fundamental inequity in its financial qualification requirements which undermines the competition the Commission seeks to advance.

2. A Fundamental Inequity in the Substantive Financial Showing Required From Applicants Impairs Competition and Must be Remedied

In the *Report and Order*, the Commission emphasized that enhancement of competition in the fixed satellite marketplace constituted a central policy objective driving its decision to harmonize and unify the regulatory models governing domsats and separate satellite systems. The Commission stated, "our primary obligation is to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible." *Report and Order* at 14 ¶ 40 (emphasis added). However, while it purported to bring regulatory parity to fixed satellite regulation by harmonizing when fixed satellite applicants must demonstrate their financial qualifications, the Commission stopped short of bringing true consistency to its financial qualification rules by failing to address the critical inequities in what respective applicants must show in order to demonstrate that they are qualified.

Specifically, the Commission failed to address the manner in which its substantive financial qualification requirements impede competition and unfairly disadvantage smaller entrepreneurial entities. To the extent the *Report and Order* purports to eliminate the distinctions between traditional domsat providers and traditional separate system providers in order to increase competition in the domestic and international markets, the Commission must confront and correct these inequities in this proceeding in order to place all competitors on an equal regulatory footing.

The present scheme governing fixed satellite applicants' financial qualifications impedes competition by placing small, entrepreneurial firms on an uneven footing relative to larger entities. Specifically, the large, highly-capitalized entities that have historically comprised the universe of domsat operators (*e.g.*, AT&T, GE Americom, and General Motors/Hughes) have been "self-financed" under Section 25.140(d), whereas the traditional separate system operators (*e.g.*, Orion and PanAmSat) are, by and large, smaller entrepreneurial firms with less internal capital that must rely on funding from external sources.

Under the Commission's present rules, self-financed applicants may demonstrate their financial qualification by presenting the Commission only with a balance sheet that reflects sufficient assets to construct and operate the proposed system: such applicants are not required to demonstrate or certify that the assets reflected in the balance sheet are unencumbered and are, in fact, immediately available to finance the system. To the extent the actual applicant is a subsidiary of a parent corporation upon which it intends to rely for its financing, the Commission requires only a management letter from the parent entity reflecting an intention to fund the applicant. Significantly, the Commission does not demand that this letter be irrevocable and unequivocal: the Commission has found it acceptable for the parent entity to condition its pledge to provide funds on the absence of a "material change in circumstances."^{15/}

^{15/} See, *e.g.*, Letter from Michael B. Targoff, Sr. Vice President of Loral Corporation, to the FCC, dated November 14, 1994 (providing funding assurance on behalf of Loral/Qualcomm Partnership, L.P. for authority to construct, launch, and operate the Globalstar Satellite System); Declaration of Ronald D. Sugar, Executive Vice President and Chief Financial Officer of TRW, Inc., dated November 9, 1994 (providing funding assurance on behalf of TRW, Inc. for authority to construct, launch, and operate the Odyssey System). The items are appended hereto as Exhibit A.

By contrast, in order to establish their financial qualifications, non-self-funded entities must demonstrate that they have obtained binding, non-contingent commitments of financing from third parties. See, e.g., *Orion Satellite Corporation*, 5 FCC Rcd 4937, 4945 n.45 (1990).^{16/} The Commission's two-stage financial qualification requirement attenuated somewhat the prejudicial impact of this more stringent substantive requirement on non-self-financed applicants. In the *Report and Order*, the Commission paid lip service to the difficulty faced by such entities,^{17/} but it took no action to remedy this disparity: indeed, by eliminating the two-stage requirement, it made the situation worse.

In order to bring true competition to the fixed satellite marketplace and assure that the U.S. public receives "the widest range of satellite service offerings from the greatest number of competitors possible,"^{18/} the Commission must give smaller entities the same financing flexibility it affords to larger applicants. The public interest would be well served by such a change. In fact, it has been the small entrepreneurs -- Orion, PanAmSat and Columbia in the international arena, and companies such as Orbcomm and American Mobile Satellite Corp. in the mobile satellite arena -- who have been on the leading edge of innovation and advances in both technology and service offerings. In contrast, the risk-averse business style

^{16/} Citing *Pan American Satellite*, 2 FCC Rcd 7011, 7012 (1987) wherein the Chief of the Common Carrier Bureau stated that "any documents of credit arrangements . . . must show committed funds which do not require any further action by either party. Similarly, equity or debt financing . . . must also be executed and non-contingent." *Id.* (Letter from Albert Halprin, Chief, Common Carrier Bureau, to Norman P. Leventhal, Esquire (November 14, 1985)).

^{17/} *Report and Order* at 14 ¶ 40 ("We are sympathetic to small companies without large corporate parents or other access to the hundreds of millions of dollars needed to construct a satellite system.").

^{18/} *Report and Order* at 14 ¶ 40.

of the traditional domsat giants such as Hughes and AT&T is not as accustomed to dramatic innovation and experimentation. To the extent parity, in the nature of a one-stage showing for all fixed satellite applicants is desirable, the Commission must correct this latent inequality in its licensing requirements in order to put all applicants on an equal footing.

B. Processing Rounds Should Not Be Employed for Fixed Satellite Systems Proposed for Locations Outside of the Traditional Domestic Orbital Arc

While the *Report and Order* addressed at some length the effect of the FCC's decision to abandon the domsat/separate satellite system dichotomy on the financial qualifications showing required of these respective entities, financial qualification constitutes only one of the issues collaterally impacted by the change. Another is the processing scheme itself. Unfortunately, the Commission devoted very little discussion to this issue and it is critical to entities like Orion.

Specifically, the FCC currently uses cut-off dates and processing round procedures to process domsat applications. Here to fore it has not done so for separate satellite systems. The *Notice* did not invite comments as to how the Commission should harmonize this procedural distinction under the new regime. Instead, almost parenthetically, the Commission in the *Report and Order* for the first time summarily concluded that "[a]ny applications filed after the adoption date of this order will be considered in future 'consolidated' FSS rounds." *Report and Order* at 15 ¶ 44. The *Report and Order* does not provide the Commission's analysis that led to this conclusion. Apparently, the Commission believed that it followed from the abandonment of the domsat/separate systems distinction as naturally as night follows day. Once again, this conclusion is unsupported, and the use of processing rounds in this context is bad policy.

Cut-off procedures and processing rounds should not be used for fixed satellites outside of the traditional domestic U.S. orbital arc. Traditionally, processing rounds have been employed traditionally in the domsat context to resolve mutual exclusivity problems that resulted from multiple applicants filing applications seeking orbital locations in close proximity to one another in the highly-congested domestic arc. As noted in section II A 1, above, demand for slots in the sections of the orbital arc historically associated with international service has not been as great and problems of mutual exclusivity have not been evident. While the Commission's action may lead to some increase in demand for these locations, at present it is not at all clear that the demand will be great enough, or the exclusivity problems so formidable, to warrant the delay in service that processing rounds often engenders.^{19/}

Avoidance of delay in the issuance of authorizations is particularly critical in the international marketplace if U.S. entities are to remain globally competitive. The rest of the world market will not stand by idle while the Commission slowly grinds through its administrative process. While U.S. international applicants are delayed in processing rounds

^{19/} Moreover, the Commission is presently exploring alternative methodologies for resolving mutual exclusivity problems -- including the use of competitive bidding. The Commission has adopted auctions in the Direct Broadcast Satellite service and indicated that it was separately exploring the issues with respect to use of auctions in other satellite services. *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, FCC 95-507, released December 15, 1995 (Report and Order in IB Docket No. 95-168 and PP Docket No. 93-253) at 61 & n.300. Moreover, on January 26, 1996, the Commission held a Roundtable Discussion Satellite Licensing Policies to explore issues relating to, among other things, the use of auctions to resolve mutual exclusivity problems in domestic and international satellite services. See *Public Notice*, released January 11, 1996 (and attached Report No. SPB-31, released November 21, 1995). In Report No. SPB-31, announcing the agenda for the discussion, the Commission stated that, "The comments received throughout this process are expected to form the basis for a formal rulemaking proposal in the first half of 1996." (emphasis added). In the event the Commission adopts such an alternative licensing scheme, processing rounds would be rendered obsolete.